NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 03-0214-F

UNITED STATES GYPSUM COMPANY,
Plaintiff

vs.

THE EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS, THE OFFICE OF COASTAL ZONE MANAGEMENT, THOMAS SKINNER, as Director of the Office of Coastal Zone Management, JOHN FLATLEY and GREGORY STOYLE, as Trustees of Schraffts Nominee Trust and 465 Medford Nominee Trust, and MICHAEL J. RAUSEO, as Trustee of Suffolk Medford Realty Trust,
Defendants

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 03-0215-G

LaFARGE NORTH AMERICA, INC.,
Plaintiff

vs.

THE EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS, THE OFFICE OF COASTAL ZONE MANAGEMENT, THOMAS SKINNER, as Director of the Office of Coastal Zone Management, JOHN FLATLEY and GREGORY STOYLE, as Trustees of Schraffts Nominee Trust and 465 Medford Nominee Trust, and MICHAEL J. RAUSEO, as Trustee of Suffolk Medford Realty Trust,
Defendants

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 03-0216-H

DONATO PIZZUTI, as Trustee of the CCC Realty Trust,
Plaintiff

vs.

THE EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS, THE OFFICE OF COASTAL ZONE MANAGEMENT, THOMAS SKINNER, as Director of the Office of Coastal Zone Management, JOHN FLATLEY and GREGORY STOYLE, as Trustees of Schraffts Nominee Trust and 465 Medford Nominee Trust, and MICHAEL J. RAUSEO, as Trustee of Suffolk Medford Realty Trust,
Defendants

CONSOLIDATED MEMORANDUM OF DECISION AND ORDER ON MOTIONS FOR JUDGMENT ON THE PLEADINGS AND FOR SUMMARY JUDGMENT

The federal Coastal Zone Management Act ("the Act"), 16 U.S.C. §§ 1451 et seq., was enacted by Congress in 1972 to ensure the proper management of the land and water resources of our nation's coastal zones. Massachusetts has established the Office of Coastal Zone Management ("OCZM") to institute and maintain a coastal zone management program that will provide Massachusetts residents with the benefits of the Act. G.L. c. 21A, § 4. One of the stated purposes of the Act was to promote the economic uses of coastal resources. To carry out this purpose, OCZM has promulgated regulations governing the primary working waterfronts within Massachusetts's developed coastal harbors, known as the Designated Port Area ("DPA") regulations. The declared objective of the DPA regulations is:

> within DPAs ... to encourage water-dependent industrial use and to prohibit, on tidelands subject to the jurisdiction of M.G.L. c. 91, other uses except for compatible public access and certain industrial, commercial, and transportation activities that can occur on an interim basis without significant detriment to the capacity of DPAs to accommodate water-dependent industrial use in the future.

301 CMR 25.01(2).

The DPA regulations recognize that maritime industries require three "essential components" of infrastructure: (1) a waterway and developed waterfront; (2) enough land adjoining the waterfront to support industrial facilities and operations; and (3) land-based transportation and public utilities that can support the industrial operations. 301 CMR 25.01 (2).

The regulations declare that, because these "essential components" are "found in a very limited and diminishing portion of the coastal zone ... [a]s a matter of state policy, it is not desirable to allow these scarce and non-renewable resources of the marine economy to be irretrievably committed to, or otherwise significantly impaired by, non-industrial or nonwater-dependent types of development that enjoy far greater range of locational options." 301 CMR 25.01(2). In other words, stated more bluntly, Massachusetts wishes to preserve those few coastal areas that support maritime industry, and does not want this scarce coastal land to be diverted to uses, such as condominium complexes, that prefer a waterfront setting but do not require it. In addition, Massachusetts does not want such non-maritime uses, like condominium residences, to be built in such close proximity to maritime industry that there will be inevitable conflicts among the neighbors and maritime industry will find it difficult to prosper.

One of the DPAs established in the Commonwealth is the Mystic River DPA in Charlestown. A map of the Mystic River DPA is appended at the end of this Memorandum. The OCZM has established boundaries for this DPA in accordance with 301 CMR 25.04, which recognizes the need to identify groups of parcels that form coherent planning units that contribute to the success of the DPA. Any landowner within the DPA may demand that OCZM conduct a boundary review to determine whether his land should remain within the DPA and be subject to the restrictions upon use that come with a DPA designation. 301 CMR 25.03(1). Indeed, any ten citizens of Massachusetts, regardless of whether they live or own property within or near the DPA, may demand a DPA boundary review. Id. However, unless there has been "substantial and rapid change that occurred in circumstances affecting the suitability of the area to accommodate water-dependent industrial use," OCZM need not conduct a boundary review if it has already

conducted such a review within the previous five years. 301 CMR 25.03(2).

In the fall and early winter of 2001-02, five property owners asked OCZM to conduct a boundary review to determine whether their property should be removed from the Mystic River DPA:

Parcel	Owner
529 Main Street ("Schrafft Center")	Schraffts Nominee Trust, John Flatley and Gregory Stoyle, Trustees
465 Medford Street	465 Medford Nominee Trust, John Flatley and Gregory Stoyle, Trustees
425 Medford Street	425 Medford Nominee Trust, John Flatley and Gregory Stoyle, Trustees
261-287 Medford Street ("Nancy Sales Property")	Suffolk Medford Realty Trust, Michael Rauseo, Trustee
30-50 Terminal Street ("Charlestown Commerce Center")	CCC Realty Trust, Donato Pizzuti, Trustee

On October 9, 2002, OCZM issued its "Boundary Review of the Mystic River Designated Port Area, Charlestown Shore" ("Boundary Review"). The Boundary Review concluded that the Schrafft Center should no longer continue to be included within the DPA. The OCZM noted that the Schrafft Center "consists of a fully developed and thriving commercial complex that provides a full complement of supporting services, including food service, recreation, physical fitness, and daycare facilities to businesses, employees, and the public." Boundary Review at 25. The Flatley Company's renovation of the building to a research and development office building had been "grandfathered under 310 CMR 9.05(3)(b)" and, as part of this renovation, the Flatley Company had received a license to create land for parking and a boardwalk with public access.

Id. In response to the license conditions, the Flatley Company also built a 650 foot public walkway, a public access fishing pier, and other open space amenities. Id. While these "public access amenities" were originally approved in 1987 because they could be easily removed if there were to be a conflict with present or future maritime uses of the DPA, the OCZM found that it was no longer realistic to treat these "public service amenities" as anything other than permanent features of the property. Id. at 25-26. It concluded that the Schrafft Center played a transitional role in that its use was compatible with the nearby working maritime industry but not incompatible with the residential community that lay just outside the DPA. Id. at 26. In essence, the OCZM found that, since the Schrafft Center had been permitted a non-industrial use of the property, its current use provided an effective transition from the industrial uses on one side and the residential uses on the other, and since it was unrealistic to imagine the walkway and fishing pier being torn down to accommodate the needs of neighboring maritime industries, it was appropriate to remove the Schrafft Center from the DPA. Id. at 26-27.

The Boundary Review concluded that 425 Medford Street, the Charlestown Commerce Center, 465 Medford Street, and the Nancy Sales Property all met the designation standards for inclusion in the DPA. Id. at 27-30. However, while the Boundary Review found that 425 Medford Street and the Charlestown Commerce Center should continue to be included within the DPA, it concluded that 465 Medford Street and the Nancy Sales Property should be excluded from the DPA once its trustees satisfied a number of conditions. Id. at 38-43. With respect to 465 Medford Street, those conditions included:

- executing an agreement with the Executive Office of Transportation and Construction ("EOTC") to underwrite the development of an engineering study, design, and plans for the construction of a new truck and rail corridor along the existing railroad line;

- placement of the monies for this engineering study in escrow;
- executing a Memorandum of Understanding granting rights over its property at 425 and 465 Medford Street and the Schrafft Center to accommodate the design and construction of the new truck and rail corridor; and
- the execution of a deed restriction prohibiting future residential development of the property.

Id. at 41-42.

With respect to the Nancy Sales Property, those conditions included:

- executing an agreement with the Executive Office of Transportation and Construction ("EOTC") to underwrite the development of an engineering study, design, and plans for the construction of a new truck and rail corridor along the existing railroad line;
- placement of the monies for this engineering study in escrow;
- the execution of a restrictive covenant agreeing not to object to the impact of nearby industrial uses on the property; and
- including in any future lease or sale of the property a condition that the tenant or new owner waive any objection to the impact of nearby industrial uses on the property.

Id. at 42-43.

The Boundary Review's reasoning for excluding 465 Medford Street and the Nancy Sales Property with these conditions was that the biggest problem facing the DPA was the reliance of its industrial users on a residential street, Medford Street, for all its heavy truck traffic. Medford Street had two problems as a roadway for this truck traffic: it was relatively narrow to carry large trucks and the volume of truck traffic irritated the Charlestown neighborhood. Id. at 39-40. The proposed solution to this problem was an industrial roadway parallel to the rail line that would deliver truck traffic to Sullivan Square. Id. at 40. The Boundary Review concluded that three issues must be resolved for such a corridor to be completed: (1) a state agency must purchase the

rights to the rail line; (2) the transportation corridor must be studied and designed; and (3) the Flatley Trusts must allow the corridor to be built over their land. Id. at 41. Essentially, while concluding that 465 Medford Street and the Nancy Sales Property met the designation standards to be included within the DPA, OCZM in its Boundary Review decided that the need for this new transportation corridor is so important to the future of the DPA that it would agree to exclude these two properties from the DPA if their owners would take specific steps that would increase the likelihood of such a corridor being built.

After an opportunity for comment, Thomas Skinner, Director of OCZM ("OCZM Director Skinner"), on December 16, 2002 issued a Designation Decision that effectively adopted the findings of the Boundary Review.

OCZM's Designation Decision triggered the three lawsuits that comprise this consolidated litigation:

1. United States Gypsum Company ("Gypsum") owns the land at 200 Terminal Street in Charlestown, which is within the Mystic River DPA. Its complaint, as it pertains to the dispositive motions addressed in this decision, challenges the OCZM's decision to exclude 465 Medford Street and the Nancy Sales Property from the DPA upon the satisfaction of the conditions set forth by OCZM.
2. LaFarge North America, Inc. ("LaFarge") owns the land at 285 Medford Street in Charlestown, which is within the Mystic Review DPA. Its complaint is essentially identical to the Gypsum complaint in challenging the exclusion of 465 Medford Street and the Nancy Sales Property from the DPA.
3. Donato Pizzuti, in his capacity as Trustee of the CCC Realty Trust ("Pizzuti"),

owns the land at 30-50 Terminal Street in Charlestown, known as the Charlestown Commerce Center. In contrast with the other plaintiffs, Pizzuti sought a Boundary Review in the hope of excluding the Charlestown Commerce Center from the DPA, and now challenges the denial of that exclusion. He also challenges the exclusion of 465 Medford Street and the Nancy Sales Property from the DPA, essentially claiming that, if the Designation Decision refused to exclude his property from the DPA, it should also have excluded these two properties from the DPA.

The parties have filed various dispositive motions, two fashioned as motions for summary judgment and one as a motion for judgment on the pleadings. Each seeks the relief sought in their respective complaints based on the administrative record, the Boundary Review, and the ultimate Designation Decision. Gypsum and LaFarge each moved for summary judgment, seeking to reverse that part of the Designation Decision which excluded 465 Medford Street and the Nancy Sales Property from the DPA once the OCZM's conditions were satisfied. Pizzuti moved for judgment on the pleadings, but the relief he seeks is essentially threefold and in the alternative. His first choice is for this Court to reverse that part of the Designation Decision that included the Charlestown Commerce Center in the DPA, and instead exclude it, along with 465 Medford Street and the Nancy Sales Property. Failing that, his second choice is for this Court to order a trial *de novo* as to whether the continued inclusion of the Charlestown Commerce Center in the DPA constitutes a regulatory taking of property that must be annulled or vacated. If denied that relief, his third choice is that the Court reverse that part of the Designation Decision which excluded 465 Medford Street and the Nancy Sales Property from the DPA once the OCZM's

conditions were satisfied. In addition, the intervenor Conservation Law Foundation has moved for summary judgment, seeking the same relief as Gypsum and LaFarge.

Given the multiple dispositive motions and their considerable overlap, this Court will not address each separately. Rather, this Court will first consider the claim of Gypsum, LaFarge, the Conservation Law Foundation, and Pizzuti (as the third alternative) that the Designation Decision should be reversed to the extent that it excluded 465 Medford Street and the Nancy Sales Property from the DPA once the OCZM's conditions were satisfied. Second, this Court will consider Pizzuti's primary claim that the Designation Decision should be reversed to the extent that it refused to exclude the Charlestown Commerce Center from the DPA. Finally, this Court will consider Pizzuti's second alternative claim that the continued inclusion of the Charlestown Commerce Center constitutes a regulatory taking that must be annulled or vacated.

DISCUSSION

I. Should the Designation Decision be reversed to the extent that it excluded 465 Medford Street and the Nancy Sales Property from the DPA once the OCZM's conditions were satisfied?

Stripped to its essence, Gypsum, LaFarge, and Pizzuti present two arguments in support of their contention that this Court should reverse that part of the Designation Decision that excluded 465 Medford Street and the Nancy Sales Property from the DPA if the OCZM's conditions were satisfied:

1. that OCZM Director Skinner exceeded his authority under the OCZM regulations when he excluded these two properties from the DPA under 301 CMR 25.03(5) after having determined under 301 CMR 25.04 "that the boundary of the DPA shall not be redrawn to exclude" them. Designation Decision at 6; and

2. that, even if he had the authority to exclude them, his decision to do so was arbitrary and capricious and not supported by substantial evidence because he permanently reduced the

size of the DPA in return for commitments that he hoped would "leverage the development" of a direct truck route that has not been funded and may never be built. See Designation Decision at 4-6.

This Court shall address each of these two arguments.

1. **Did OCZM Director Skinner exceed his authority under the OCZM regulations when he excluded 465 Medford Street and the Nancy Sales Property from the DPA under 301 CMR 25.03(5) after having determined under 301 CMR 25.04 "that the boundary of the DPA shall not be redrawn to exclude" them?**

Under 301 CMR 25.04(2):

An area of land reviewed under 301 CMR 25.00 shall be included or remain in a DPA if and only if CZM finds that the area is in substantial conformance with the following criteria governing suitability to accommodate water-dependent industrial use, as appropriate to the harbor in question:

a. the land area must include, or be contiguous with other DPA lands that include, a shoreline that has been substantially developed with piers, wharves, bulkheads, or other structures that establish a functional connection with a water area meeting the criteria set forth in 301 CMR 25.04(1);

b. the land must lie in reasonable proximity to:

   1. established road or rail links leading to major trunk or arterial routes; and
   2. water and sewer facilities capable of supporting general industrial use;

c. the land area must exhibit a topography that is generally conducive to industrial use, or reasonably capable of becoming so in terms of technology, cost, and other appropriate factors governing engineering feasibility; and

d. the land area must exhibit a use character that is predominately industrial, or reasonably capable of becoming so because it does not contain a dense concentration of:

   1. non-industrial buildings that cannot be removed or converted, with relative ease, to industrial use; or

   2. residential, commercial, recreational, or other uses that unavoidably would be destabilized if commingled with industrial activity.

After considering these criteria governing suitability, OCZM Director Skinner concluded that 465 Medford Street and the Nancy Sales Property were in substantial conformance with these criteria and should remain within the DPA. Gypsum, LaFarge, and Pizzuti argue that this finding should have ended the discussion as to whether 465 Medford Street and the Nancy Sales Property remain in the DPA, noting that the regulation states that these areas of land "shall" remain in the DPA if found in substantial conformance with the governing criteria. 301 CMR 25.03(5), however, provides that "[t]he Director may qualify, limit, or otherwise condition the designation decision in any manner that serves the purposes of these regulations," and OCZM Director Skinner interpreted this provision to grant him limited discretion to modify the DPA determination. He acknowledged that this regulation did not give him unlimited discretion to overrule the designation standards. Rather, he wrote:

> In applying the clear language of 301 CMR 25.03(5), CZM is thus careful to affirm that: 1) the designation standards establish a high presumptive threshold that any proposed discretionary action must overcome; 2) the purposes of the regulations must be advanced significantly with any exercise of discretion; and 3) any discretionary action must clearly demonstrate that it will substantially improve the ability of the DPA to serve the purposes for which ... it was designated.

Designation Decision at 6.

"Ordinarily an agency's interpretation of its own rule is entitled to great weight. ... However, this principle is one of deference, not abdication, and courts will not hesitate to overrule agency interpretations of rules when those interpretations are arbitrary, unreasonable or inconsistent with the plain terms of the rule itself." Finkelstein v. Board of Registration in Optometry, 370 Mass. 476, 478 (1976). Granting OCZM's interpretation of its own regulations the appropriate deference, this Court finds that Director Skinner's interpretation is not arbitrary,

unreasonable, or inconsistent with the regulations themselves. The plain language of 301 CMR 25.03(5) gives the Director the authority to "qualify, limit, or otherwise condition the designation decision in any manner that serves the purposes of these regulations." Unless this language is to be ignored or treated as mere surplusage, it plainly grants a significant degree of discretion to the Director to impose conditions on the designation decision as long as doing so serves the purpose of encouraging water-dependent industrial use within the DPA. The Director, through his own interpretation restated above, placed considerable limitations on the exercise of this discretion, essentially requiring that the "discretionary action must clearly demonstrate that it will substantially improve the ability of the DPA to serve the purposes for which ... it was designated." Designation Decision at 6. This grant of discretion, as limited by the Director's interpretation, was reasonable not only in view of the language of the regulations but also in view of the overall purpose of the regulations. Without it, OCZM would have to keep a property within the DPA if it met the criteria set forth in 301 CMR 25.04(2), even if doing so would undercut the overall purpose of the regulations to protect water-dependent industrial use in selected coastal zones. This Court shall not read the OCZM regulations to be so wooden as to prohibit the exercise of sound discretion that will better serve its mission, especially when the exercise of that discretion has been so severely limited by its own interpretation.

2. **Even if the Director had the authority to exclude these properties from the DPA, was his decision to do so arbitrary and capricious or not supported by substantial evidence because he permanently reduced the size of the DPA in return for commitments that he hoped would "leverage the development" of a direct truck route that has not been funded and may never be built?**

The parties, at the request of the Court, have written learned briefs debating whether the Designation Decision here should be viewed as a regulatory decision, subject to review under the

arbitrary and capricious test, or an adjudicatory decision, subject to review by the substantial evidence test. See generally Sierra Club v. Commissioner of Dept. Of Environmental Management, 439 Mass. 738, 745-749 (2003); Levy v. The Acting Governor, 436 Mass. 736, 745-747 (2002); Cambridge Elec. Light Co. v. Dept. of Public Utilities, 363 Mass. 474, 486-488 (1973). The "boundary between the concepts of 'regulation' and 'adjudication' has not been exactly placed despite formidable attempts at clarification." Cambridge Elec. Light Co. v. Dept. of Public Utilities, 363 Mass. at 486. Here, the Designation Decision bears indicia of both an adjudicatory and regulatory decision. It may be understood to be adjudicatory in that the owner of the property is entitled to a review of his property's inclusion in the DPA every five years upon request, notice of the review must be published and the owner has the opportunity to comment upon it both in writing and at a hearing, and the decision must be issued in writing and state the reasons for any boundary changes. See 301 CMR 25.03. It may be seen as regulatory in that the review may be conducted without the request or participation of the owner of the property, any member of the public (not just the owner of the property) has the right to comment and be heard at the hearing, and the review is focused on the regulatory determination of whether the property itself is in substantial conformance with the criteria governing suitability to accommodate water-dependent industrial use, not an adjudication of the rights of the owner. See 301 CMR 25.03 & 25.04(2).

Perhaps because the line between a regulatory versus an adjudicatory decision is not always clear and the distinction sometimes unpersuasive, the Supreme Judicial Court has declared that "[t]he question is not to be decided by a mechanical process of categorization; rather we rely on the considerations of functional suitability...." Sierra Club v. Commissioner of

Dept. Of Environmental Management, 439 Mass. at 746, quoting Cambridge Elec. Light Co. v. Department of Pub. Utilities, 363 Mass. at 488. In Levy, the Supreme Judicial Court found that the appropriate level of review for the removal of a member of the Board of the Massachusetts Turnpike Authority by the Acting Governor was the substantial evidence test "[b]ecause the Legislature has determined that the public would be better served by an independent Authority that operates more like a business than a government agency, because lenders and investors have a need to be secure in the identity of management, because of the importance to the public, lenders and investors of an independent Authority free from the changing winds of politics, because of the need to preserve that independence, and because the Governor has no broad power of oversight of the Authority here." 436 Mass. at 748.

Here, OCZM itself recognizes the dangers that would arise if the discretion given to the Director under 301 CMR 25.03(5) were not carefully limited. Pragmatically, if the only judicial review of the exercise of that discretion were the arbitrary and capricious test, which would simply determine whether the Director's exercise of that discretion lacked a rational basis, see Sierra Club, 439 Mass. at 748, there would be no meaningful review of whether the Director's departure from the otherwise mandatory designation standards indeed overcame the " high presumptive threshold that any proposed discretionary action must overcome" to "clearly demonstrate that it will substantially improve the ability of the DPA to serve the purposes for which ... it was designated." See Designation Decision at 6. Judicial review under the substantial evidence test is necessary to ensure that the limits on the Director's discretion imposed by OCZM itself are properly enforced; a mere rational basis test would fail to accomplish that because it would not realistically thwart an OCZM Director who "talked the

talk" of carefully limited exercise of discretion but in practice failed to "walk the walk." In short, the only way to ensure that the discretionary exercise of 301 CMR 25.03(5) is as limited as OCZM wants it to be is to permit judicial review based on the more rigorous, but still deferential, substantial evidence test.

The Supreme Judicial Court has defined substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion." Cherubino v. Board of Registration of Chiropractors, 403 Mass. 350, 354 (1988), quoting G.L. c. 30A, § 1(6). Judicial review under the substantial evidence standard is "circumscribed." Cherubino, 403 Mass. at 354. "It is a standard of review 'highly deferential to the agency', which requires (as G.L. c. 30A, § 14[7] mandates) according 'due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.'" Hotchkiss v. State Racing Com'n, 45 Mass. App. Ct. 684, 695-696 (1992), quoting Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992). "While we must consider the entire record, and must take into account whatever in the record detracts from the weight of the [board's] opinion, ... as long as there is substantial evidence to support the findings of the [board], we will not substitute our views as to the facts." Cherubino, 403 Mass. at 354, quoting Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966) and Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 304 (1981). "If the agency has, in the discretionary exercise of its expertise, made a 'choice between two fairly conflicting views,' and its selection reflects reasonable evidence, '[a] court may not displace [the agency's] choice ... even though the court would justifiably have made a different choice had the matter been before it de novo.'" Hotchkiss, 45 Mass. App. Ct. at 696, quoting Southern Worcester County Regional Vocational

Sch. Dist. v. Labor Relations Commn., 386 Mass. 414, 420 (1982).

Applying that standard, this Court finds that the OCZM's exercise of discretion to exclude 465 Medford Street and the Nancy Sales Property from the DPA once its owners satisfy the conditions set forth in the Designation Decision was supported by substantial evidence. It is essentially undisputed that the businesses within the DPA generate substantial truck traffic and that this traffic currently uses a roadway (Medford Street) that is better suited for residential use. Because Medford Street is relatively narrow and often subject to obstructions from on-street parking, driveway entrances, and pedestrian use, it is difficult for trucks at times to navigate this roadway. Because Medford Street cuts through a Charlestown neighborhood and is close to Charlestown High School, truck travel on Medford Street is a continuing source of friction with that residential community. They complain of the safety risk to the many pedestrians who walk on Medford Street and of the noise caused by the trucks, which use the roadway both during the day and at night. The City of Boston commissioned a study in 1990 to evaluate alternatives for an industrial haul road that would permit truck traffic from the DPA to reach Sullivan Square and, from there, major highways without burdening Medford Street. From this study emerged an alternative preferred both by the City and the neighborhood that would create a two-way industrial roadway within the DPA parallel to the existing rail line that would lead to Sullivan Square. That study estimated the cost of such a roadway, not including land acquisition and the reconfiguration of telephone, gas, and electric lines, to be roughly $5 million in 1991 dollars. If past is prologue, the anticipated cost of such a roadway would be much higher, probably at least $20 million.

It was reasonable for the Director to conclude that the construction of this industrial

roadway was essential to the long-term economic health of the DPA. It was also reasonable for him to conclude that, despite the apparent need, little progress was being made towards its construction. The Director, adopting the findings of the Boundary Review, essentially found that public funds for the construction of the roadway were unlikely until three issues were resolved: (1) a state agency must purchase the rights to the rail line; (2) the transportation corridor must be studied and designed; and (3) the Flatley Trusts must allow the corridor to be built over their land. Finding that the first issue was already being addressed by the Commonwealth and Massport, he essentially traded the DPA designation of 465 Medford Street and the Nancy Sales Property in order to resolve the latter two issues. As a condition of being excluded from the DPA, the owners of these two properties were required to pay for an engineering study, design, and plans for the construction of the new roadway and the Flatley Trusts were required to grant rights over their properties at 425 and 465 Medford Street and the Schrafft Center to accommodate the new roadway.

Reasonable persons may differ as to whether the Director was wise to have made this trade without any commitment of public funds to build this roadway. There certainly remains the possibility that his effort to "jump start" the construction of this roadway will fail for lack of public funds, or that the effort will not bear fruit for many years. There also remains the possibility that he could have extracted more from this trade, either by demanding more from the owners of these two properties or by conditioning the properties' removal from the DPA on the receipt of a public commitment of construction funds to build the roadway. It is also true that, until the new roadway is built, the concessions he made will make the traffic situation worse, because the new artists' lofts and residences at the Nancy Sales Property will add to automobile

and pedestrian traffic, leave even less room for the trucks to pass, and create even greater conflicts between the neighborhood and the DPA businesses. Yet, the substantial evidence standard does not require that the Director have made the best possible trade or pursued the wisest strategic course. It is enough that he rendered a reasonable decision based on the evidence available to him. Here, there is evidence to support the Director's conclusion that the conditions he extracted from the owners of 465 Medford Street and the Nancy Sales Property significantly increased the likelihood that the critical industrial roadway would be built sooner rather than later, and that the remaining businesses in the DPA would economically be healthier in the long run as a result.

There is also evidence to support the Director's conclusion that, in essence, losing the Nancy Sales Property would not significantly injure the DPA. Unlike the other properties, the Nancy Sales Property is adjacent to waterfront property but does not itself lie on the waterfront, and therefore does not have the same physical relationship to active DPA properties. Moreover, the building on the Nancy Sales Property is not conducive to industrial use and realistically would need to be torn down for the property to be put to an industrial use. While the same cannot be said of the property at 465 Medford Street, the trade involving that property yielded perhaps the most important condition towards the eventual construction of the industrial roadway – the grant of a right of way for the roadway over all the Flatley properties.

In short, this Court cannot say that it was unreasonable for the Director to conclude that it was sensible for the long run economic health of 94 percent of the existing DPA to sacrifice six percent of the DPA land in return for concessions that significantly increased the likelihood that the badly needed industrial roadway would more quickly be constructed. This exercise of

experienced judgment is precisely what the substantial evidence standard permits agencies to perform without the interference of the courts when, as here, the judgment relies on the available evidence and is thoughtful and considered. Therefore, the claim of Gypsum, LaFarge, the Conservation Law Foundation, and Pizzuti (as the third alternative) that the Designation Decision should be reversed to the extent that it excluded 465 Medford Street and the Nancy Sales Property from the DPA once the OCZM's conditions are satisfied must be denied. Judgment on the pleadings shall enter on this claim in favor of the defendants.

II. **Should the Designation Decision be reversed to the extent that it refused to exclude the Charlestown Commerce Center from the DPA?**

Pizzuti argues that there was not substantial evidence to support the Designation Decision that the Charlestown Commerce Center should remain in the DPA.[1] This Court need not dwell long on this claim. Under 301 CMR 25.04(2), OCZM need only find that the property is "in substantial conformance" with the four criteria "governing suitability to accommodate water-dependent industrial use;" it need not find perfect conformance. Moreover, the regulations specifically direct OCZM "to apply the foregoing suitability criteria in the context of groups of parcels that form coherent planning units, rather than to individual project sites ...." 301 CMR 25.04(3).

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[1] This Court expressly does not decide whether judicial review of a determination under 301 CMR 25.04 as to whether a property is in substantial conformance with the criteria governing suitability to accommodate water-dependent industrial use should, like the exercise of discretion under 301 CMR 25.03(5), be governed by the substantial evidence standard rather than the arbitrary and capricious standard. These two determinations, while related, are quite different, in that the first is based on factual conformance with various criteria, while the second is entirely discretionary. Suffice it to say that the reasons why this Court applied the substantial evidence to the latter do not apply to the former. Since this Court plainly finds that there is substantial evidence to support the boundary determination under 301 CMR 25.04, it need not sort out whether a more deferential standard should be applied.

Looking at each of the four criteria, there is more than substantial evidence that:

1. The Charlestown Commerce Center includes, or is contiguous with other DPA lands that include, a shoreline that is substantially developed with piers or other structures that establish a functional connection to the water. See 301 CMR 25.04(2)(a). It may indeed be true, as Pizzuti contends, that this property has not recently been used in ways that are connected with the Mystic River, that the pier has become so dilapidated that it no longer permits direct access to the River, and that it has given an easement to LaFarge to protect LaFarge's ability to receive barge traffic, but none of this negates this first criterion. The Commerce Center is bordered on two sides by properties with developed shorelines – LaFarge to the west and the Massport Autoport to the east. The fact that it has allowed its pier to become dilapidated does not mean that its shoreline is not substantially developed, especially when there is evidence that the Commerce Center has a licensed pier structure and a dredged berthing slip.

2. Its land area lies in reasonable proximity both to established road or rail links leading to major truck or arterial routes, and to water and sewer facilities capable of supporting general industrial use. See 301 CMR 25.04(2)(b). The Charlestown Commerce Center abuts Terminal Street, which can carry truck traffic onto nearby Interstate 93. It need not be in reasonable proximity to road and rail links; road links alone are sufficient. While Medford Street is admittedly a problematic road link to the highway, it nonetheless is an established road link that has served that function for many years. The Commerce Center presently has tenants that use its water and sewer facilities, and there was sufficient evidence to conclude that its water and sewer facilities could support general industrial users.

3. Its topography, being flat and free of topographic restriction, is generally conducive to industrial use. See 301 CMR 25.04(2)(c). While this property may be rather small for industrial use, that alone is not determinative of this criterion, because the Director is required under 301 CMR 25.04(3) "to apply the suitability criteria in the context of groups of parcels that form coherent planning units, rather than to individual project sites ....".

4. Its land area exhibits "a use character that is predominantly industrial, or reasonably capable of becoming so ...." 301 CMR 25.04 (2)(d). Already, the Commerce Center is predominantly used by businesses engaged in warehousing and manufacturing. While the interior configuration of its buildings may prevent industrial use, there is nothing that prevents these buildings from being renovated to become "reasonably capable" of future industrial use. Moreover, as earlier stated, these criteria must be applied in the context of groups of parcels that form a coherent planning unit, and there are industrial uses on both sides of this property. In view of the existing industrial use on adjoining properties, it cannot reasonably be said that this property is not reasonably capable of becoming predominantly industrial because of the proximity of the Charlestown neighborhood.

In view of the credible evidence supporting the findings as to each of the four necessary criteria, this Court finds that the OCZM's Director's Designation Decision continuing to keep the Charlestown Commerce Center within the DPA was supported by substantial evidence.

Nor can it reasonably be argued that the Director was under a legal obligation to exercise his discretion under 301 CMR 25.03(5) so as to exclude the Commerce Center from the DPA. The OCZM Director exercised that discretion in favor of the 465 Medford Street and the Nancy Sales Property because of the concessions he obtained in return, which permitted him to conclude that the purpose of the regulations were better served by excluding them from the DPA in return for these concessions. Pizzuti has failed to provide any evidence that it offered anything in return for its exclusion that would legally obligate the Director to exercise his limited discretion to add the Commerce Center to the excluded properties.

Nor can Pizzuti reasonably contend that his due process rights were violated by OCZM excluding these other properties from the DPA, but continuing to include the Commerce Center. OCZM complied with its notice and comment obligations under its regulations. It set forth in writing in its Boundary Report precisely what it planned to do with respect to each of the properties at issue, and provided Pizzuti with an opportunity to comment on this Boundary Report. The process that is due under these regulations does not include the opportunity to negotiate a property's exclusion from the DPA in return for various concessions.

Consequently, Pizzuti's claim that the Designation Decision must be reversed because it is not supported by substantial evidence and violates his right to due process must be denied. Judgment on the pleadings shall enter on this claim in favor of the defendants.

III. **Is there a genuine issue of material fact as to whether the continued inclusion of the Charlestown Commerce Center constitutes a regulatory taking?**

Pizzuti's final claim is that the continued inclusion of the Charlestown Commerce Center within the DPA constitutes a regulatory taking that must be annulled or vacated. It is important to note that Pizzuti is not presently seeking compensation for what he contends to be a regulatory taking; he recognizes that he must petition for damages under G.L. c. 79, § 10 in order to obtain such compensation, which he has not yet done. Rather, the relief he seeks through his regulatory taking claim is essentially the same as the relief he seeks through his claim that the Designation Decision was not supported by substantial evidence – he wants that Designation Decision vacated and his property excluded from the DPA. Pragmatically, what he hopes to accomplish by this regulatory claim is a *de novo* evidentiary hearing regarding the inclusion of the Charlestown Commerce Center within the DPA, where this Court will not be limited to the administrative record and need not give deference to the fact-finding of the OCZM Director. To be blunt, he seeks to make an end run around the strictures of an administrative appeal by raising a constitutional taking claim.

The Supreme Judicial Court in Lopes v. City of Peabody permitted a landowner to challenge the validity of a zoning ordinance governing wetlands that he contended denied him all economically beneficial use of his property, even though the landowner had purchased the property after the zoning ordinance had been enacted. 417 Mass. 299, 302-304 (1994). There, the Court declared:

> We do not attribute to Peabody an intention to adopt a zoning restriction that denies all economically beneficial use to a parcel of land except where, in circumstances recognized by the Lucas opinion [Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)], that restriction is independently justified by other principles of land use law restricting the

> use of that land. Hence, if the ordinance denies the Lopes property all economically beneficial use and no justification exists for that restriction, a judgment should be entered that the restrictions of the ordinance are inapplicable to Lopes's property to the extent necessary to eliminate that denial, that is, to permit an economically beneficial use of the land. ...On the other hand, if the ordinance does not deprive the Lopes property of all economically beneficial use, the validity of the ordinance and the related question whether there has been a regulatory taking must be considered for Federal constitutional purposes under the principles that were applicable prior to the Lucas case (and, of course, in any event, pursuant to any further guidance that may be available from the Supreme Court before the Land Court should decide the case). See, as to the regulatory taking question, Agins v. Tiburon, 447 U.S. 255, 260 (1980), and Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

Id. at 303-304.

Here, viewing the administrative record evidence in the light most favorable to Pizzuti, it is plain that he has not yet been denied all economically beneficial use of his land by his property's inclusion within the DPA. Even if Pizzuti is correct that his property cannot be used for the marine industrial uses that are required of properties within a DPA, the OCZM regulations permit 25 percent of DPA property to be used for non-water dependent and non-industrial purposes provided such uses are "compatible with activities characteristic of a working waterfront." 310 CMR 9.02. This alone negates the claim that the inclusion of the Commerce Center within the DPA deprives the property of all economically beneficial use. Moreover, presently, Pizzuti is leasing two-thirds of his building space for non-marine industrial uses through an amnesty license he obtained from the Massachusetts Department of Environmental Protection ("DEP"). At the very least, Pizzuti's claim that he has been denied all economically beneficial use of his land is not ripe for review as long as he is able to lease his building space through this DEP amnesty license. See Daddario v. Cape Cod Com'n, 425 Mass. 411, 414 (1997).

Even if there has not been a total denial of all economically beneficial use of his property, Pizzuti contends that he is still entitled to discovery and a trial *de novo* as to whether there was a regulatory taking using the so-called Penn Central factors referred to by the Supreme Judicial Court in Lopes. See *infra* at 23. In Penn Central, the United States Supreme Court admitted that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Penn Cent. Transp. Co. v. New York City, 438 U.S. at 124. The Court continued:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. ... So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id.

Applying those three factors here, and viewing the record in the light most favorable to Pizzuti, it is plain that there is no genuine issue of material fact as to whether the Commerce Center's continued inclusion within the DPA constitutes a regulatory taking that, as a matter of constitutional law, must be annulled. As to the first factor – the economic impact of the regulation, this Court has little doubt that the fair market value of Pizzuti's property would be higher if there were no restriction on its use, but zoning-type laws such as the OCZM regulations "have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property." Id. at 125. Even "a substantial diminution" in the value of a

property "does not create a right of compensation." W.R. Grace & Co.-Conn. v. City Council of Cambridge, 56 Mass. App. Ct. 559,575 (2002). See also Concrete Pipe & Products of California v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993) ("mere diminution in the value of property, however serious, is insufficient to demonstrate a taking"); Zanghi v. Board of Appeals of Bedford, 61 Mass. App. Ct. 82, 89 (2004) ("a property owner must show that the economic impact of the governmental impact was severe"). Here, without even considering the possibility that the existing buildings on the property can be torn down or refurbished to allow marine industrial use, it is undisputed that its existing building is two-thirds occupied because of the DEP amnesty and that one-quarter of the property may be used for non-water dependent and non-industrial purposes provided such uses are "compatible with activities characteristic of a working waterfront." 310 CMR 9.02. Consequently, as of now, the economic impact of the regulation on the Commerce Center falls well short of the impact needed to be considered a regulatory taking. See Leonard v. Town of Brimfield, 423 Mass. 152, 156 (1996) (inability to build on approximately ten acres of sixteen acre parcel not severe economic impact).

As to the second factor – the regulation's interference with investment-backed expectations, there is no dispute that Pizzuti purchased the property in 1992, when it had been included within the Mystic River DPA. He could not have had a reasonable investment-backed expectation that the property would be excluded from the DPA when it was included at the time of purchase. See Leonard v. Town of Brimfield, 423 Mass. at 155. "[T]he government is not required to compensate an individual for denying him the right to use that which he has never owned." Id., quoting Fragopoulos v. Rent Control Bd. of Cambridge, 408 Mass. 302, 308 (1990), which quotes Flynn v. Cambridge, 383 Mass. 152, 160 (1981).

As to the third factor – the character of the governmental action, there is no dispute that there was no physical invasion of Pizzuti's property and that the purposes of the regulations at issue promote the public good. Indeed, Pizzuti, quite properly, does not even contend that the OCZM regulations here constitute a taking because they do not "substantially advance legitimate state interests." Steinbergh v. City of Cambridge, 413 Mass. 736, 744 (1992), quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980).

In short, a claim of regulatory taking is not simply an alternative route to obtain a *de novo* review of an adverse administrative decision that is supported by substantial evidence. "[A] party challenging governmental action as an unconstitutional taking bears a substantial burden." Eastern Enterprises v. Apfel, 524 U.S. 498, 523 (1998). Where, based on the administrative record, viewed in the light most favorable to that party, the party making such a claim has no reasonable expectation of meeting that burden, this Court will grant summary judgment on that claim rather than permit discovery and a de novo trial that would otherwise be unavailable in a case that in essence is one of agency review. Therefore, summary judgment is granted to the defendants as to Pizzuti's taking claims.

ORDER

For the reasons stated above, this Court hereby **ORDERS** that:

1. The claim of Gypsum, LaFarge, the Conservation Law Foundation, and Pizzuti (as the third alternative) that the Designation Decision should be reversed to the extent that it excluded 465 Medford Street and the Nancy Sales Property from the DPA once the OCZM's conditions are satisfied is **DENIED**. Judgment on the pleadings shall enter on this claim in favor of the defendants.

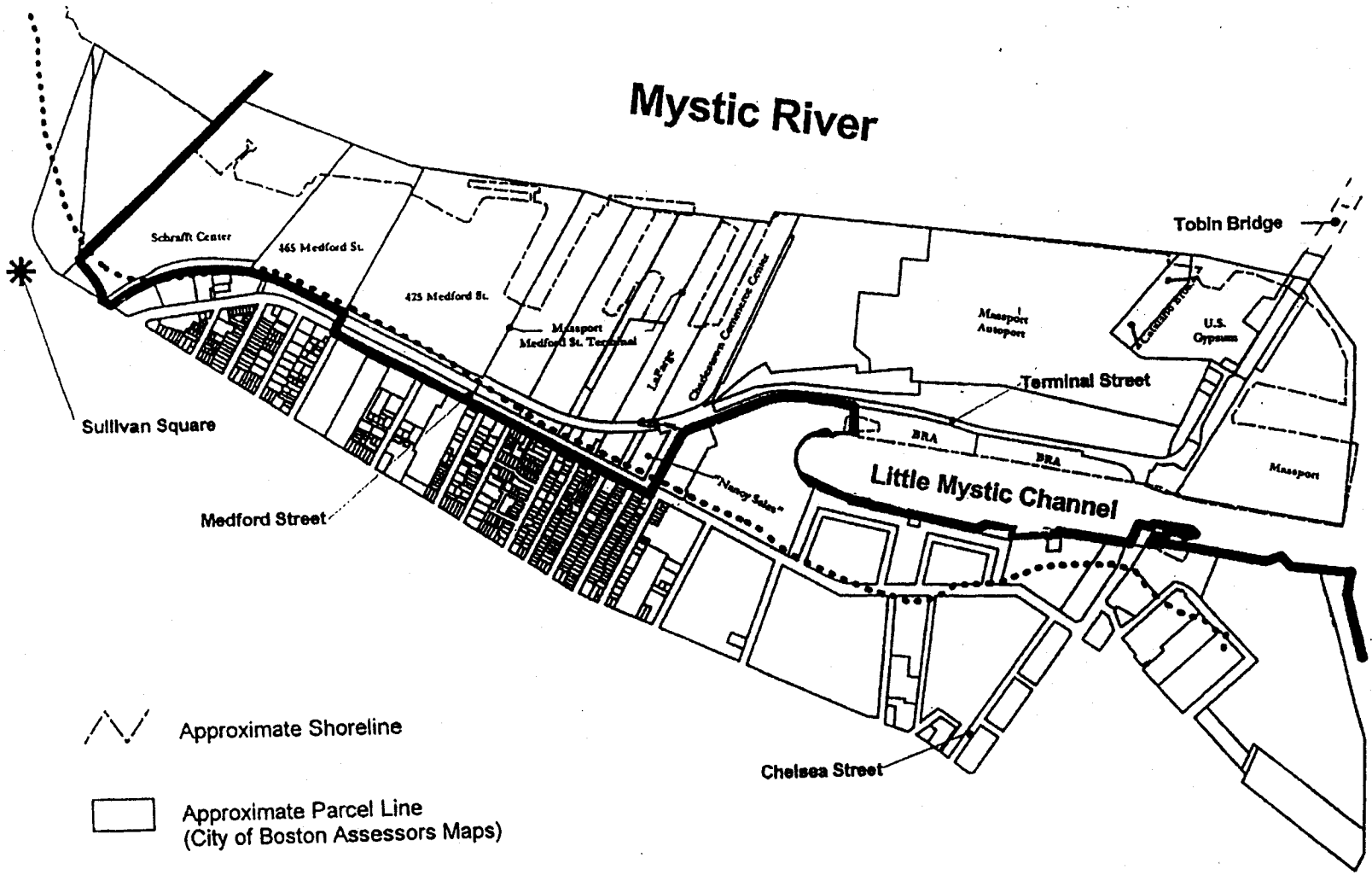
2. Pizzuti's claim that the Designation Decision must be reversed because it is not supported by substantial evidence and violates his right to due process is **DENIED**. Judgment on the pleadings shall enter on this claim in favor of the defendants.

3. Summary judgment is **GRANTED** to the defendants on Pizzuti's taking claims.

4. Final judgment shall enter as to all claims in favor of the defendants.

Ralph D. Gants
Justice of the Superior Court

Dated: March 24, 2005



Approximate Shoreline

Approximate Parcel Line
(City of Boston Assessors Maps)

Approximate DPA Boundary Line

Historic High Water Line
(Approximate Location)

Mystic River DPA - Charlestown - Figure 1

Scale: 1" = 800' +/-